United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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76-7442, 7451

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

OSCAR ROBERTSON, et al.,
Plaintiffs-Appellees,

CHESTER WALKER, CLIFFORD RAY, and
WILTON N. CHAMBERLAIN,
Appellants,

v.

NATIONAL BASKETBALL ASSOCIATION, et al.,
Defendants-Appellees.

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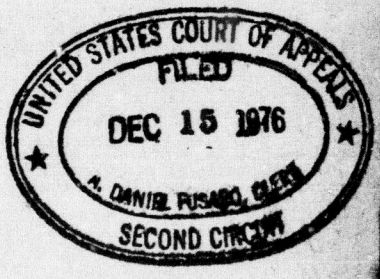
Pls



Appeals From the United States District Court for the Southern District of New York.

JOINT BRIEF OF APPELLANTS ON THE COMMON ISSUES.

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Appellants,	:	Docket Nos. 76-7442 76-7451
-v-	:	
NATIONAL BASKETBALL ASSOCIATION, et. al.	:	
Defendants-Appellees	:	

THE ISSUES PRESENTED FOR REVIEW

1. Was it an abuse of discretion for the District Court to approve a settlement containing provisions that are likely violations of §1 of the Sherman Act?

2. Were appellants' constitutional rights under the due process clause of the Fifth Amendment violated by the District Court's certification of this class action under 23b(1)(A), rather than 23(b)(3), where only the latter contains an opt-out provision, and where the requirements for 23b(1)(A) certification were clearly not met?

STATEMENT OF THE CASE

This is an appeal by three members of the plaintiff-class, from the Order of Judge Carter approving the settlement in this litigation.* One of the appellants, Chester Walker, is a named plaintiff. All three are members of the class that was certified by the District Court.

This antitrust litigation commenced in April, 1970. The defendants were charged with violations of the Sherman Act, through the implementation and enforcement of, inter alia, several group boycotts. Among those boycotts were the college draft and the compensation rule.

In February, 1975, Judge Carter certified the class under Rule 23b(1)(A).

In January, 1976, appellant Walker, alleging an additional boycott perpetrated solely against him, filed an individual action in the United States District Court for the Eastern District of Pennsylvania. That action was enjoined by the United States District Court for the Southern District of New York on February 26, 1976.

On February 21, 1976, a settlement agreement was reached between defendants and all named plaintiffs except appellant Walker. Notice of the settlement was mailed to the class members on May 5, 1976.

The District Court held a hearing on the settlement's propriety on June 23, 1976, and approved the settlement on July 30, 1976 over the objections of appellants.

SUMMARY

The District Court abused its discretion by:

1. approving a settlement that contains likely violations of §1 of the Sherman Act, and

* Robertson v. National Basketball Association, et al, 1976-2 Trade Cases, Para. 61,029 (S.D.N.Y. August 2, 1976)

2. certifying the class under 23b(1)(A) rather than 23(b)(3), even though requirements for b(1)(A) certifications were not met, which action, by preventing appellants from opting-out, violated their rights under the Fifth Amendment.

ARGUMENT

I.

THE DISTRICT COURT ABUSED ITS DISCRETION BY APPROVING A SETTLEMENT THAT CONTAINS LIKELY VIOLATIONS OF THE SHERMAN ACT

The settlement agreement provides for the perpetration of two classic group boycotts that violate §1 of the Sherman Act:

1. The College Draft. The settlement will allow the draft to operate for ten years. No player can become a free agent without sitting out a full two years, an option that even plaintiffs' counsel admits is "severe."*

2. The Compensation Rule.** The settlement will allow the NBA's equivalent of the NFL Rozelle Rule to remain in effect until 1981. For an additional six years after that, 1981-1987, a form of the Rozelle Rule will still be perpetuated. During that latter period, the player's original team will enjoy a right of first refusal. The player is required to play for his original team, so

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* 777ATRR 8/17/76 A-1, 3:
"Millstein also conceded that the quid pro quo for a rookie's freedom to negotiate with any NBA club - sitting out two seasons - is 'severe', however, such players have opportunities to compete in the European leagues, and they wind up with a right never enjoyed by any player escaping the draft."

** This scheme requires any NBA team who wishes to employ a player upon the expiration of his option with his current team to compensate the player's current team by meeting all of the demands of the current team. Failure to meet the demands of the current team results in determination by the NBA commissioner of the compensation to be paid to the player's current team. Inability to meet the compensation demands requires the prospective employer to boycott the player.

long as that team matches the offer made by the team the player wishes to join. Thus, potentially, the player is locked into his original team until at least 1987.

That these schemes are unlawful cannot be disputed. Klor's Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators Guild v. F. T. C., 312 U.S. 457 (1941); U. S. v. General Motors Corp., 384 U.S. 127 (1966); Taxi Weekly, Inc. v. Metropolitan Taxicab Board of Trade, Inc., 1976-2 Trade Cas. Paragraph 60, 978 (2nd Cir. 1976).

Precisely this type of college draft was deemed a violation of the Sherman Act under both per se and rule of reason analysis in Smith v. Pro-Football, 1976-2 Trade Cas. Paragraph 61,050 (D.D.C. Sept. 8, 1976):

> "The essence of the draft is straightforward: the owners of the teams have agreed among themselves that the right to negotiate with each top quality graduating college athlete will be allocated to one team, and that no other team will deal with that person. This outright, undisguised refusal to deal constitutes a group boycott in its classic and most pernicious form, a device which has long been condemned as a per se violation of the antitrust laws. United States v. General Motors Corp. 384 U.S. 127 (1966); Radiant Burners, Inc. v. Peoples Gas Co., 364 U.S. 656 (1961); Klor's Inc. v. Broadway Hale Stores, Inc. 359 U.S. 207 (1959); Fashion Originators Guild v. F. T. C., 312 U. S. 457 (1941). There is no question but that the restrictions comprising the draft 'are naked restraints of trade with no purpose except stifling of competition,' White Motor Co. v. United States, 372 U. S. 253 (1963); indeed, the owners attempt to justify its use by claiming that the league could not survive the competition for the services of the premier players that would ensue in its absence. But '(e)xclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free market principles embodied

> in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system (of organizing their distribution operations). . .', (citation omitted) None of the cases cited by defendant, in urging that the draft does not violate these laws, suggests in any way that such direct, explicit, and purposive restraints on competition as those which characterize the draft can escape from per se rule, much less be found reasonable." id. at p. 69,739.40 (emphasis added).

In like manner, the compensation rule of the NFL ("Rozelle Rule"), which is the same as the NBA's compensation rule, was held a §1 violation in Mackey v. National Football League, 1976-2 Trade Cas. Para. 61119 (8th Cir. Oct. 18, 1976) (rule of reason analysis). The Court of Appeals agreed with the District Court that the NFL had failed to consider less restrictive alternatives to the Rozelle Rule:

> "In conclusion the court held that the Rozelle Rule was unreasonable in that it was overly broad, unlimited in duration, unaccompanied by procedural safeguards, and employed in conjunction with other anticompetitive practices such as the draft, Standard Player Contract, option clause, and the no-tampering rules." id. at p. 70,075.

The instant settlement agreement, it is important to note, contains none of the less restrictive alternatives suggested by the Eighth Circuit in Mackey.

As a result of Smith and Mackey, the college draft and the compensation rule have been eliminated from professional football.* As a result of the NBA settlement, the college draft and the compensation rule will continue until 1987, unless this Court intervenes.

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* Professional hockey players are also free from the shackles of the compensation rule. Boston Professional Hockey Association v. Cheevers, 348 F. Supp. 261 (D. Minn. 1972); Nassau Sports v. Hampson, 355 F. Supp. 733 (D.Mass.1972).

Ironically, the same court that perpetuated and institutionalized the group boycotts in the settlement agreement by approving that agreement had earlier evidenced a different opinion of the defendants' practices:

> "I must confess it is difficult for me to conceive of any theory or set of circumstances pursuant to which the college draft, black listing, boycotts and refusals to deal could be saved from per se condemnation. . .. The life of these restrictions, therefore, appears to be all but over . . ." Robertson v. National Basketball Association, 389 F. Supp. 867, 895 (S.D.N.Y. 1975)

THE SETTLEMENT AGREEMENT IS NOT EXEMPT FROM THE ANTITRUST LAWS

In order for an agreement affecting mandatory subjects of bargaining to be exempt from the antitrust laws, there must be bona fide arms-length bargaining:

> "Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona-fide arms-length bargaining. [Amalgamated] Meat Cutters v. Jewel Tea [381 U.S. 676 (1965)]." Mackey, supra, 1976-2 Trade Cas. at p. 70,070.

Applying the arms-length bargaining requirement to the instant settlement agreement, it becomes plain that the agreement cannot be exempt from the antitrust laws.

Unlike the normal labor agreement, this one will not be re-negotiated for ten years. Children now in elementary school will bear the burden of what plaintiffs' counsel calls the "ten-year experiment" of the college draft and the compensation rule. In short, hundreds of persons certain to be restrained by the draft and compensation rule have in no way been represented in the negotiations of the settlement agreement. Hence, no genuine arms-length bargaining occurred.

Smith, supra, supports that conclusion. In Smith, supra, the plaintiff had been drafted in January of 1968. The NFL draft had been negotiated in March of 1968. Hence, the labor exemption was held inapplicable. 1976-2 Trade Cas. at p. 69,739.

Like Smith, future NBA players ten years from now will have had no chance to choose the representatives who negotiated the settlement. Those future players were, therefore, clearly not represented. As to them, arms-length bargaining did not take place.

With regard to such future players, the group boycotts will have been unilaterally imposed by the NBA, and will be in existence for 10 years. For precisely such reasons, the Eighth Circuit held that the NFL compensation rule (the Rozelle Rule) was not immune from antitrust scrutiny:

> "On the basis of our independent review of the record, including the parties' bargaining history as set forth above, we find substantial evidence to support the finding that there was no bona fide arm's-length bargaining over the Rozelle Rule preceding the execution of the 1968 and 1970 agreements. The Rule imposes significant restrictions on players and its form has

remained unchanged since it was unilaterally promulgated by the clubs in 1963. The provisions of the collective bargaining agreements which operated to continue the Rozelle Rule do not in and of themselves inure to the benefit of the players or their union. Defendants contend that the players derive indirect benefit from the Rozelle Rule claiming that the union's agreement to the Rozelle Rule was a quid pro quo for increased pension benefits and the right of players to individually negotiate their salaries. The district court found, however, that there was no such quid pro quo, and we cannot say, on the basis of our review of the record, that this finding is clearly erroneous. (footnote omitted.)" 1976-2 Trade Cas. at p. 70, 071.

The labor exemption cannot apply.*

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* The normal rule, in determining the propriety of a settlement, against determination by the Court of the merits of the case, State of West Va. v. Chas. Pfizer & Co., 314 F. Supp. 710, 714 (S.D.N.Y. 1970), aff'd. 440 F.2d 1079, 1085-86 (2d Cir.), cert. denied, 404 U.S. 871 (1971), does not apply. It is the merits of the agreement that appellants pray this Court to resolve, rather than the merits of the case itself.

II.

CERTIFICATION OF THE CLASS UNDER 23b(1)(A) WAS AN ABUSE OF DISCRETION AND VIOLATED APPELLANTS' DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION

SUMMARY

It was an abuse of discretion for the lower court to have certified the class under Rule 23b(1)(A):

1. The requirement for 23b(1)(A) certification, that individual actions "would establish incompatible standards of conduct for the party opposing the class", has not been met. Under the collateral estoppel rule of Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U. S. 313 (1971), once any NBA player obtained a court ruling that held the NBA's group boycotts unlawful, the defendants would be barred from re-litigating the lawfullness of those boycotts. Thus, incompatible standards of conduct could not be established.

2. Given the unavailability of 23b(1)(A) and the fact the litigation is clearly one for damages, only 23(b)(3) can properly be relied upon for certification.

3. By failing to certify under 23(b)(3), appellants were prevented from opting-out, and were thereby deprived of their rights under the due process clause of the Fifth Amendment of the United States Constitution.

II-1.

THE 23(b)(1)(A) REQUIREMENT THAT INDIVIDUAL ACTIONS "WOULD ESTABLISH INCOMPATIBLE STANDARDS OF CONDUCT FOR THE PARTY OPPOSING THE CLASS" HAS NOT BEEN MET

The court below feared that different adjudications would force defendants into inconsistent standards of conduct. 389 F. Supp. at 901. However, this fear is unfounded, since the Supreme Court's collateral estoppel rule would make it impossible for the NBA to re-litigate the legality of the group boycotts, once those boycotts were held unlawful.

In Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) the Supreme Court held that a patentee could not re-litigate the validity of its patent once that patent had been declared invalid in a prior suit. 402 U. S. at 350.

The Blonder-Tongue rule has been applied to foreclose 23(b)(1)(A) class certification in antitrust litigation. In In re Yarn Processing Patent Litigation, 56 FRD 648 (S.D. Fla. 1972), the Court held:

> "While this provision (23(b)(1)(A)) has arguably been met here, it is not at all clear that one or two, or even several findings of patent validity, with a subsequent finding of invalidity, make the required standard of conduct of the patentee 'incompatible'. (footnote omitted) The finding of invalidity would create the collateral estoppel effect mandated by Blonder-Tongue (supra). . . The one-way street of Blonder-Tongue, supra, means that if the patentee loses, the other putative class members win by collateral estoppel default. If the patentee prevails in one suit, that does not control any subsequent adjudication. A new defendant is allowed to retry the validity of the

patent anew. The only inpediment is one for the patentee, not the other class members." (footnote omitted) id. at 654.*

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THIS CLASS ACTION IS ESSENTIALLY FOR DAMAGES. HENCE, 23(b)(3) AND THAT SECTION'S OPT-OUT PROVISION MUST CONTROL.

It has been demonstrated that 23b(1)(A) is inapplicable to this class action. The extremely mild injunctive relief obtained, moreover, clearly proves that the action can only be seen as one for damages. Hence, only 23(b)(3) should have been used to certify the class. Green v. Occidental Petroleum Corp. 1976 CCH Sec. L. Rep. Para. 95,729 (9th Cir. 1976); Moore's Federal Practice, Para. 23-01 (10-3).

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FAILURE TO PROVIDE APPELLANTS WITH THE OPPORTUNITY TO OPT-OUT VIOLATES THEIR RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Under that section, class members would have had the opportunity to opt-out. The lower court's refusal to certify under 23(b)(3) prevented appellants

* It is well-settled that the Blonder-Tongue rule is not confined to patent litigation. See, e.g. In Re Piper Aircraft Distribution System Antitrust Litigation, 411 F. Supp. 115, 117 (WD Mo. 1976)(re-litigation of class action issues in separate lawsuits).

Certification under 23b(1)(A) is made even more inappropriate by the defendants' express willingness to run the risk that incompatible standards of conduct would be established. Such willingness on the part of the defendant is itself sufficient to preclude b(1)(A) certification. Chevalier v. Baird Savings Association, 1976-2 Trade Cases Para.61,126(E. D. Pa. 1976) at p.70,108.

from opting-out and, by doing so, denied them of their constitutional rights under the due process clause of the Fifth Amendment.

It is a fundamental principal of Anglo-American jurisprudence that in order to be bound by a judgment, a party to litigation must be afforded due process rights under the Fifth Amendment to the Constitution of the United States. Pennoyer v. Neff, 95 U. S. 714 (1922). In the class action context it is settled that a judgment may constitutionally bind class members only if certain due process requirements have been met. Foremost among these is the requirement that the class action representatives adequately represent the interest of class members.

> "(T)his Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it." Hansberry v. Lee, 311 U. S. 32, 42 (1940) (emphasis added).

In the case sub judice, the interests of objecting plaintiff Chester Walker have not been adequately represented by the named plaintiffs. After the litigation was commenced Walker became the object of a boycott by the National Basketball Association and its member teams, and as a result, was unable to play in the National Basketball Association during the 1975-76 season. Chester Walker thus

found himself in a unique situation. In order to recover the damages he suffered as a result of that boycott, Chester Walker filed in the United States District Court for the Eastern District of Pennsylvania a private antitrust suit, Chester Walker v. National Basketball Association, et al. Civ. Act. No. 76-291. Chester Walker's interests cannot and will not be served by the proposed settlement in this case since the parties to this action intend that the settlement will, by its res judicata effects, preclude Walker from pursuing his private lawsuit while failing to compensate him for the boycott which was directed against him. No class representative will adequately represent Chester Walker's interest unless the settlement in this suit adequately compensates Chester Walker for the individual and unique injury he suffered during the 1975-76 playing season.

The inadequacy of the representation is made all the more egregious by the fact that Chester Walker was and remains a named plaintiff in this case. This settlement was negotiated without his consent, and against his wishes. If this court approves the settlement, it would sanction a procedure by which the majority of named plaintiffs may force another named plaintiff to accept a resolution of his lawsuit against his will. Such a procedure is obviously contrary to the Fifth Amendment to the Constitution of the United States.

In like regard, Ray and Chamberlain have not been adequately represented, and wish to pursue individual actions. Both (as well as Walker) can obtain substantially more in such suits than they will receive under the settlement. This is especially accurate, since the settlement gives absolutely no weight to the concededly "superstar" status* of each.**

The inadequacy of the representation is made doubly clear by the relief sought by the plaintiffs-appellees, as contained in the settlement agreement. That agreement contains antitrust violations that appellants want to eradicate. Plaintiffs-appellees, on the other hand, wish to perpetuate those violations, as demonstrated by their defense of the agreement. It is therefore unmistakably clear that the goals and interests of plaintiffs-appellees and appellants are at odds. Necessarily, therefore, plaintiffs-appellees cannot adequately represent the interests of the appellants.

Hansberry supports that conclusion. In Hansberry, petitioners sought to challenge the validity of a restrictive covenant. That covenant had been held valid in a prior suit brought by persons who were purportedly within the same class as petitioners. However, the Supreme Court held that the petitioners were

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* See special weighted damage formula used for "blue chip" or "superstar" status used in Smith, supra.

**The settlement fund will be allocated according to seniority.

not bound by the prior suit, since plaintiffs in that prior suit in reality wanted to perpetuate the restrictive covenant, not challenge it like the petitioners:

> "Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far."
> Hansberry v. Lee, supra, 311 U. S. at 45-46.

In short, appellants here are seeking to abolish the antitrust violations. Plaintiffs-appellees have demonstrated that they want to institutionalize those violations:

> "In seeking to enforce the agreement the plaintiffs in that suit were not representing the petitioners here whose substantial interest is in resisting performance."
> id. at 45-46.

It is thus clear that the appellants were not adequately represented in this litigation. It was precisely to prevent such consequences that the opt-out provision was created. Failure to grant appellants the opportunity to opt-out is therefore a direct cause of the inadequate representation. This failure was due to conduct of a governmental judicial official and thus violates appellants' constitutional rights under the Fifth Amendment. Hansberry v. Lee, supra.

CONCLUSION

We respectfully submit that the approval of the settlement should be reversed.

Respectfully submitted,

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